UPREME COURT. U. S.

JAMES R. BROWNING, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 91

RAY CASH,

Petitioner,

vs.

. CULVER, State Prison Custodian,

Respondent.

CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE PETITIONER

IRWIN L. LANGBEIN
Potter, Langbein & Burdick
205 Datura Street
West Palm Beach, Florida
Counsel for Petitioner

SUBJECT INDEX

	Page
BRIEF FOR THE PETITIONER	
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Questions Presented	2
Statement	3
Summary of Argument	6
ARGUMENT	8
I. Under the Circumstances of the Trial, the Denial of Petitioner's Motion for Assignment of Counsel Deprived Him of Due Process of Law	8
A—Accomplice Testimony and Its Corroboration	11
B—Testimony Concerning Petitioner's Participation in Other Crime	15
C—Guilt by Association: Testimony Concerning Crime Committed by Petitioner's Brothers But Not by Petitioner	18
D—Retrial After Hung Jury	22
II. Quite Apart From the Circumstances of the Trial, the Denial of Petitioner's Alternative Motion for Continuance to Engage Counsel Deprived Him of His Specific Constitutional Right to Paid Counsel of His Own Choice	23
III. The Incorporation of a Newspaper Account of the Trial Into the Sworn Petition for Habeas Corpus Constitutes an Adequate Allegation of the Trial Events Recited in the Account	27
CONCLUSION	31
APPENDIX	33

CITATIONS:

CASES:

	Page
Acree v. *State*, 153 Fla. 561, 15 So. 2d 262 (1943)	24
Alford v. *State*, 47 Fla. 1, 36 So. 436	23
Bacon v. *State*, 22 Fla. 52 (1886)	11
Bass v. *State*, 121 Fla. 208, 163 So. 485 (1935)	12
Betts v. *Brady*, 316 U.S. 455	24
Bridges v. *Wixon*, 326 U.S. 135	20
Cash v. *Culver*, 2 L.Ed. 2d 1155, 1548	3
Chandler v. *Fretag*, 348 U.S. 3	7, 24, 25
Cochran v. *Kansas*, 316 U.S. 255	29
DeMerleer v. *Michigan*, 329 U.S. 663	9
Duke v. *State*, 106 Fla. 205, 142 So. 886 (1932)	20
Durley v. *Mayo*, 351 U.S. 277	29, 30
Gibbs v. *Burke*, 337 U.S. 773	9, 10, 20, 29, 30, 31
Hatcher v. *State*, 74 Fla. 112, 76 So. 694 (1917)	11
Hawk v. *Olson*, 326 U.S. 271	25, 26, 28
Henderson v. *State*, 135 Fla. 548, 185 So. 625 (1938)	11, 13
Holiday v. *Johnson*, 313 U.S. 342	29
House v. *Mayo*, 324 U.S. 42	9, 21, 28
Johnson v. *Mayo*, 158 Fla. 264, 28 So. 2d 585 (1946)	8
Johnson v. *State*, 157 Fla. 328, 25 So. 2d 801 (1946)	12
Krulewich v. *United States*, 336 U.S. 440	19
Land v. *State*, 59 So. 2d 370 (Fla. 1952)	11
Lee v. *State*, 115 Fla. 30, 155 So. 123 (1934)	12
Marino v. *Ragen*, 332 U.S. 561	9
Moat v. *Mayo*, 82 So. 2d 591 (Fla. 1955)	31
Padgett v. *State*, 53 So. 2d 106 (Fla. 1951)	12, 16
Palko v. *Connecticut*, 302 U.S. 319	15, 24
Palmer v. *Ashe*, 342 U.S. 134	6, 8
Pennsylvania v. *Claudy*, 350 U.S. 116	28
People v. *Nitzberg*, 287 N.Y. 183, 38 N.E.2d 490, 40 N.E.2d 40, 138 A.L.R. 1253 (1941)	14
Powell v. *Alabama*, 287 U.S. 45	9, 25
Pyle v. *Kansas*, 317 U.S. 213	29
Rice v. *Olson*, 324 U.S. 786	9, 21, 29
Shuler v. *State*, 57 So. 2d 336 (Fla. 1952)	19

Page

Sneed v. *Mayo*, 66 So.2d 865 (Fla. 1953) 10, 11
State v. *Mayo*, 87 So.2d 501 (Fla. 1956) 30, 31
Townsend v. *Burke*, 334 U.S. 736 ..... 10, 21
Tomkins v. *Missouri*, 323 U.S. 485 29
Uveges v. *Pennsylvania*, 335 U.S. 437 9
Varnum v. *State*, 137 Fla. 438, 188 So. 346 (1939) 12, 13
VonMoltke v. *Gillies*, 332 U.S. 708 ..... 9, 19
Wade v. *Mayo*, 334 U.S. 672 ..... 6, 8, 9, 10, 21
Waley v. *Johnston*, 316 U.S. 101 ..... 28, 30
Washington v. *Mayo*, 77 So. 2d 620 (Fla. 1955) .. 30
Williams v. *Georgia*, 349 U.S. 375 ..... 26, 27
Williams v. *Kaiser*, 323 U.S. 471 ..... 9, 28, 29

STATUTES:

Florida Statutes 1957 (cited F.S.)
§90.10 23
§90.14 25
§810.01 ..... 3, 19, 21
§833.01 19
§833.04 19
§909.21 8
§924.17 21
§924.23 21
§932.33 25
Florida Session Laws (cited L.)
L. 1955 c. 29927 25
L. 1957 c. 57-383 19

OTHER CITATIONS:

Florida Jurisprudence, Vol. 13, Evidence, §§143-151 16
Goldstein, Trial Technique (1935), 354 29
H.R. 8361, 85th Cong. 31
H.R. Rep. No. 1293, 85th Cong., 2d Sess., p. 32 31
Sen. Rep. No. 2228, 85th Cong., 2d Sess., p. 33 31
Wigmore, Evidence
§§1029, 1032 23
§§2056, 2059 14
N. Y. Times, August 16, 1958, p. 4 31

Questions Presented

1. The petition for habeas corpus complains of deprivation of right to counsel, alleging that petitioner's state court conviction of burglary, for which he is now serving a fifteen-year sentence, took place under the following circumstances:

> Petitioner, an uneducated farm boy of twenty, had had a hung jury on his previous trial for the same burglary charge, then defended by his own paid lawyer. That lawyer withdrew a week before retrial opened, without prior notice. Petitioner's mother on his behalf then tried to engage "a number" (unspecified) of lawyers, but they all refused to serve, telling her the fee she could offer was inadequate and the time for preparation too short. On retrial day petitioner moved for continuance to engage counsel or, alternatively, for court appointment of counsel. At this time petitioner called the trial judge's attention to his youth, his lack of education and courtroom experience, and the sudden withdrawal of prior counsel. The trial judge denied the motion, and petitioner then attempted to conduct his own defense. The retrial involved difficult problems of evidence and of defense tactics, arising out of the prosecution's use of accomplice testimony. This time the jury convicted petitioner. A first offender, he was sentenced to the fifteen-year term he is now serving (R. 2-4).

Does this habeas corpus petition state a prima facie case?

2. Certain of the essential allegations of the sworn petition are in the form of extracts from a newspaper account of the retrial, viz., statements of events occurring in open court and statements of the newspaper reporter's impression from those events, that petitioner did not competently defend himself. Are these newspaper extracts proper for consideration as allegations in support of petitioner's claim that he was deprived of his right to counsel?

Statement of the Case

The record below consists only of the petition for writ of habeas corpus addressed to the Supreme Court of Florida (R. 1-19), and that court's denial of the petition (R. 20). The petition was verified November 25, 1957 (R. 20). The record omits the filing date of the petition but shows that that court denied it within the fortnight, by order dated December 10, 1957 (R. 20), without opinion.

The petition, diffuse and argumentative, recites (and its content demonstrates) that it was prepared without counsel (R. 1).[1] We select the following as its essential allegations:

On December 6, 1954, petitioner was tried by jury on a burglary charge[2] (R. 2). He was then represented by paid and experienced criminal trial counsel (R. 11). That trial resulted in a hung jury (R. 2).

Petitioner was immediately then placed in solitary confinement. He remained there for two and a half months awaiting retrial, which took place on Monday, February 21, 1955. Petitioner did not know the date scheduled for retrial until the day before it took place. At some date unspecified after the first trial, petitioner's paid counsel moved to withdraw, and the motion was granted. Petitioner, however, was informed of the withdrawal only a few days before the trial, through a prison official.

---

[1] Undersigned counsel entered the case under appointment by this Court, *Cash* v. *Culver*, 2 L.Ed. 2d 1548, after the Court granted petitioner's motion to proceed *in forma pauperis* and for writ of certiorari (R. 21), 2 L.Ed. 2d 1155.

[2] "Breaking and entering to commit a felony", i.e., FS §810.01, a noncapital felony punishable by up to twenty years imprisonment. Petitioner's sentence was for fifteen years (R. 3).

Just how many days before the trial he was informed is not clear, for the petition recites both petitioner's own statement that it was four days before retrial and the prosecuting attorney's statement that it was seven (ib.). During these few days prior to trial, be it four or seven, petitioner's mother attempted to engage counsel for him. She consulted "a number" (unspecified) of lawyers, who all rejected the case because the fee she was able to offer was inadequate and the time for preparation too short.

At the opening of the retrial, petitioner moved for continuance on the ground that he needed time to employ new counsel, and that he had not been informed either by his old counsel or by the court that trial day was to be that day. The prosecutor informed the trial judge of petitioner's mother's efforts to obtain substitute counsel. In the words of a newspaper account of the trial which is incorporated into the sworn petition:

> "Duncan [the prosecutor] said he talked with Cash's Mother last week and she told him she was going to get a lawyer that day" (ib.).[3]

In the alternative, petitioner's motion was for appointment of counsel:

> "Petitioner explained to the Court that he was not capable of representing himself, that he was only 20 years of age and was uneducated and had never heard a court trial except the one time he was tried on the same charge, and then he was represented by Mr. Carr, and that he did not know court procedure or how to conduct his defense, and told the court he had been closely

[3] This passage is one of several in the petition which are in the form of quotations from newspaper coverage of the trial. The propriety of petitioner's reliance on allegations in this form is discussed under Question 2, Point III.

confined in solitary at the Florida State Prison at Raiford, up until the night before, and therefore he had no opportunity to employ new counsel, since the Court had permitted his chosen counsel to abandon him in the face of trial, and it was an absolute necessity that the court grant a continuance, or, in the alternative, for the court to remedy the situation by appointing counsel to represent the petitioner" (R. 3).

The petition does not recite what consideration the trial judge gave the motion, but sets out only that the ground the trial judge stated for the denial was that "the State had gone to great expense to bring witnesses to testify and therefore petitioner would have to stand trial that day" (ib.). The trial then proceeded at once. The petition does not purport to summarize the whole trial, but the following episodes are revealing:

Petitioner's co-defendant Lawrence Allen pleaded guilty and testified for the state (R. 3). The petition alleges that "there was nothing that would connect Allen and the petitioner except Allen's word" (R. 4). Allen's testimony, likewise quoted from the newspaper account, "related how he and Cash in company of two others, burglarized stores, stole a truck, and became engaged in a running gun battle with police" (R. 12). The petition fails to state whether petitioner objected to these items of evidence, although it alleges generally that he made a number of unspecified objections to the introduction of evidence (R. 14). The petition alleges specifically, however, that petitioner did object to the introduction of a revolver, taken from the store he was charged with burglarizing (R. 14). This weapon turned up in California in possession of Allen when Allen was arrested there (R. 3).

Allen also testified that he, Allen, had "pulled a $180,000 robbery" in New Orleans, in which petitioner took no part

although two of petitioner's older brothers, Virgil and Fred Cash took part (R. 11). Allen further testified that one of these brothers, Fred, had also taken part in the crime for which petitioner was on trial (R. 17-18). The petition likewise does not show whether petitioner objected to this testimony.

On conviction, petitioner, a first offender, was sentenced to the fifteen-year term he is now serving (R. 13). The state's witness against him, Allen, an ex-convict, was sentenced to ten years but placed on probation. No charges were brought against either Fred Cash or against John Fulford, the fourth person named by Allen as a participant in the crime for which petitioner was convicted (R. 18).

Summary of Argument

I

Under the line of decisions typified by *Wade* v. *Mayo*, 334 U.S. 672, and *Palmer* v. *Ashe*, 342 U.S. 134, petitioner's state court conviction of burglary after denial of his request for assignment of counsel deprived him of due process of law, because his youth and ignorance made it particularly unlikely that he could protect himself in a trial of any complexity.

In fact, the trial was complex, involving tactical problems in meeting accomplice testimony and its corroboration; and the prosecution took advantage of petitioner's ineffectiveness in his own defense, to introduce highly prejudicial evidence which should have been excluded under state law. This evidence consisted of testimony by the accomplice concerning petitioner's participation in other crimes, offered without meeting any of the exceptions to the rule against such evidence; and testimony, also by the accom-

plice, concerning participation by petitioner's brothers in other crimes in which it was not claimed petitioner had any part. Additionally, the mere fact that the trial was a retrial, and that on the first trial petitioner had achieved only a hung jury although then represented by an experienced criminal lawyer, establishes the need for counsel.

The denial of petitioner's alternative motion for continuance to seek new paid counsel deprived him of his constitutional right to be heard by hired counsel of his own choice, for the denial was arbitrary within the doctrine of *Chandler* v. *Fretag*, 348 U.S. 3. The expense to the state in maintaining prosecution witnesses during a continuance, adduced by the trial judge as the ground for denying the motion, is trivial. The sudden discovery, only a week or less before the retrial, that petitioner's former counsel had withdrawn, gave petitioner too short a time to engage new counsel in view of petitioner's limited funds and the complexity of the impending retrial. The Florida rule that continuance is discretionary does not supply an adequate nonfederal ground for denying continuance to seek paid counsel.

Since petitioner was deprived of counsel over his objection, he was deprived of due process.

II

The Court should not decline to consider those allegations of the petition which take the form of excerpts from a newspaper account of petitioner's trial, including the reporter's impression that petitioner tried his case incompetently. Since the petition was sworn, petitioner adopted the newspaper account as his own. Since the petition was filed pro se, it is entitled to untechnical construction. Such construction is particularly necessary because this case comes from Florida, for under the Florida statutory and decisional law

against repetitious habeas corpus, petitioner may never have another chance to prove the facts that underlie a poorly phrased allegation.

ARGUMENT

I

Under the Circumstances of the Trial, the Denial of Petitioner's Motion for Assignment of Counsel Deprived Him of Due Process of Law.

Petitioner is serving a fifteen-year (R. 4) penitentiary sentence for the noncapital crime of burglary, "breaking and entering with intent to commit a felony" (R. 2), F.S. §810.01. Although at the opening of his trial petitioner requested assignment of counsel[4] (R. 3), Florida law, as this Court has recognized, does not require assignment of counsel in noncapital prosecutions. F.S. §909.21; *Johnson* v. *Mayo,* 158 Fla. 264, 28 So. 2d 585 (1946); certiorari denied, 329 U.S. 804; rehearing denied, 329 U.S. 835 (818); *Wade* v. *Mayo,* 334 U.S. 672, 675, 679. This case, therefore, involves another of the many applications of the settled doctrine, summarized in the opening words of *Palmer* v. *Ashe,* 342 U.S. 134, 135:

> "This Court has repeatedly held that the Due Process Clause of the Fourteenth Amendment requires states to afford defendants assistance of counsel in noncapital criminal cases when there are special circumstances showing that without a lawyer a defendant could not have an adequate and a fair defense."

---

[4] We shall argue as a separate Point II the alternative head of the same motion, in which petitioner applied for continuance to engage private counsel.

One of the catalogues of such circumstances is that in *Uveges* v. *Pennsylvania*, 335 U.S. 437, 441, where this Court said that counsel was required:

> "[w]here the gravity of the crime and other factors —such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair."

Petitioner stood trial. What happened illustrates the observation in *Gibbs* v. *Burke*, 337 U.S. 773:

> "A defendant who pleads not guilty and elects to go to trial is usually more in need of the assistance of a lawyer than one who pleads guilty." 337 U.S. at 781.

We shall show that the trial was constitutionally offensive in every category just quoted from the list in *Uveges* v. *Pennsylvania*, 335 U.S. 437. Petitioner's own view of the case stressed his youth and ignorance.[5] We rest the case equally upon the complexity of the trial judgments petitioner had to make, *Rice* v. *Olson*, 324 U.S. 786, 789; *Williams* v. *Kaiser*, 323 U.S. 471, 474-475; *VonMoltke* v. *Gillies*, 332 U.S. 708, 721-722, and on the failure of the trial judge

---

[5] The petition itself emphasizes petitioner's youth (age 20—R. 3), that he is "uneducated" (no detail given except that he is a farm boy—R. 12), and his lack of prior experience in court (limited to being present while his first counsel conducted his first trial—R. 3), as demonstrating the need for counsel (R. 13). His petition (R. 13) argues particularly from *Wade* v. *Mayo*, 334 U.S. 672, 683-684, which was also a not-guilty plea from Florida. Some of the many other cases involving the factors of youth and ignorance, whether in guilty plea or trial situations, are: *Powell* v. *Alabama*, 287 U.S. 45, 69; *House* v. *Mayo*, 324 U.S. 42, 45; *Uveges* v. *Pennsylvania*, 335 U.S. 437, 439; *Marino* v. *Ragen*, 332 U.S. 561, 562; *deMeleer* v. *Michigan*, 324 U.S. 663.

to "guide a defendant without a lawyer past the errors that make trials unfair," *Townsend* v. *Burke*, 334 U.S. 736, 740; *Gibbs* v. *Burke*, 337 U.S. 773, 781; for the face of the petition discloses petitioner's fumbling and ineffectual efforts during the trial to protect himself not only against the admissible evidence, but also against evidence that was patently irrelevant and prejudicial.

In *Sneed* v. *Mayo*, 66 So. 2d 865, 875 (Fla. 1953), the Supreme Court of Florida, deferring to *Wade* v. *Mayo*, 334 U.S. 672, announced the policy of granting habeas corpus in noncapital cases, to investigate allegations of denial of counsel to the young and ignorant, even though there were then no such allegations of detailed mishandling of the ensuing trial as in the petition here. For that reason we think the instant action of that court, denying this petition outright, explicable only because this petition buried its allegations of clearly remediable facts under a mass of other charges, some immaterial, some frivolous and some simply speculative.

The petition for habeas corpus is cast in the pathetic jumble of the half-literate and the pretentiously legalistic which is the mark of the prison-made pro se document. We have had to extract the factual allegations here compressed into our Statement, from a strident catalogue of other grievances. See, for example, the allegation comparing the accomplice witness Allen's wealth and petitioner's poverty (R. 3); the argument concerning the Florida law of continuances (R. 9, 10); the suggestion of sinister purpose in the solitary confinement (R. 10, 18), and in the failure of the prosecution to file charges against two other persons named in Allen's testimony (R. 18); the general charge, stated in the form of a rhetorical question, that there was a three-cornered conspiracy between the prosecutor, the accomplice witness Allen, and petitioner's former paid

attorney, to have the attorney withdraw (R. 11); and the speculation that the trial judge might have been bribed (R. 17). Small wonder, if no constitutional excuse, that the busy Supreme Court of Florida[6] did not find the patience to winnow from this mass of irritating chaff, submitted pro se, the relatively few and scattered allegations that we assert make this a hornbook case of deprivation of the right to counsel.

A—Accomplice Testimony and Its Corroboration

The essential testimony connecting petitioner with the crime was that of the co-defendant Lawrence Allen, who testified in detail that he, petitioner, and two others committed the burglary (R. 4, 12). A number of items of loot, including a revolver from the burglarized store, all found in Allen's possession when he was arrested in California several months after the burglary, were received in evidence for corroboration (R. 3, 12).

Florida is one of the states which do not require that accomplice testimony be corroborated at all, *Bacon* v. *State,* 22 Fla. 52 (1886); *Hatcher* v. *State,* 74 Fla. 112, 76 So. 694 (1917); *Land* v. *State,* 59 So. 2d 370 (Fla. 1952). Since in Florida the suspect origin of such testimony goes only to its weight, Florida law has developed a number of trial techniques directed to disclosing lack of weight. For example, the accomplice witness may be cross-examined on whether he is testifying under agreement for leniency, *Henderson* v. *State,* 135 Fla. 548, 185 So. 625, 626-627, 628 (1938). Again, the defendant may demand that the trial judge charge the jury on the weight of accomplice testimony, that it must be received "with great caution"; and

[6] The petition was filed in that court (R. 1), as a matter of original cognizance. The procedure is explained in *Sneed* v. *Mayo,* 66 So. 2d 865, 874 (1953).

omitting the one word "great" from the charge is error. *Varnum* v. *State*, 137 Fla. 438, 188 So. 346 (1939);[7] see also *Padgett* v. *State*, 53 So. 2d 106 (Fla. 1951), cited below in another connection. Likewise, a careful trial probing of the accomplice testimony, even though it does not convince the jury, will occasionally lead the Florida Supreme Court to reverse on the ground that "justice will be subserved by ordering a new trial because the admitted testimony does not bear on its face the indicia of a truthful narration of facts." *Lee* v. *State*, 115 Fla. 30, 155 So. 123, 129 (1934).

The newspaper account of the trial described petitioner's attempt at defense:

> "While making objections and inquiring of the Judge and witnesses, Cash appeared unsure of himself. On several occasions he would start a sentence, then stop to rephrase it or start on another subject. Before making objections Cash raised his hand to attract the attention of the Judge, then in a halting manner would make his statement" (R. 14-15).

We submit that a layman laboring under the handicaps so described could not be expected to know how to wield the several trial weapons we have just inventoried, although Florida law supplied them ready to his hand. Had the trial judge given thought to the trial ahead when he denied petitioner counsel, he must have known that petitioner would not have been able on cross-examination to test the credibility of the accomplice witness by exploration of details (*Lee*). Similarly, the trial judge must have known that no layman could be expected to know that a deal with

---

[7] At one time a defendant was even entitled to this cautionary instruction at the very point when the accomplice took the stand, *Bass* v. *State*, 121 Fla. 208, 163 So. 485 (1935), overruled *Johnson* v. *State*, 157 Fla. 328, 25 So. 2d 801 (1946).

the prosecution for leniency (*Henderson*) is not the usual thing that the ignorant may assume, but a proper subject of merciless inquiry and bitter comment that frequently leads a jury to acquit. Similarly, the trial judge must have known that no layman could be expected to know he had a right to submit a draft jury charge, or the effect therein of the small word "great" (*Varnum*).

Although the prosecution did not have to corroborate under Florida law, it undertook to do so. The newspaper account continues:

> "State Attorney Ted Duncan today began the laborous (*sic*) process of corroborating testimony that Ray Cash participated in a burglary here last year.
>
> "Yesterday, Lawrence Allen, a friend of Cash's for over four years took the stand for an hour and a half and related how he and Cash in company of two others, burglarized stores, stole a truck and became engaged in a running gun battle with police. Duncan said today he would call most of the State witnesses to corroborate Allen's account of the crime" (R. 12).

This corroboration, as already noted, consisted of loot from the burglary, identified by other witnesses as turning up in the accomplice's possession.[8] Such corroboration, however, corroborates only the fact that the witness was himself connected with the crime. It establishes that the witness is not a masochist seeking his own destruction, but it does not establish that he is not a liar seeking to save himself

---

[8] The only item clearly identified is a revolver, but the petition's language suggests other items: "It should be noted that all of the evidence introduced by the State was taken from the car and house trailer of the co-defendant Allen" (R. 3). The newspaper account reports that "over twenty items of evidence linking [Cash] to the burglary" were placed in evidence at the prior trial, but does not specifically show whether they were used at the retrial too (R. 12).

by causing the destruction of his co-defendant, for it does not connect the defendant with the crime. In recognition of this infirmity in the probative force of such corroboration, some states reject it and require corroboration not only of the accomplice's testimony that the accomplice took part in the crime but of the accomplice's testimony that the defendant took part as well. The statutes are collected, *Wigmore, Evidence*, §2056, the cases ib. §2059, to the point that in some twenty states there must be what was lacking here, corroboration of the identity of the defendant as a participant in the crime.

A New York case arising from one of the spectacular Murder, Inc. prosecutions points out the illogic and the danger of the practice followed here:

> "Each and every of the matters sworn to by the non-accomplice witnesses was undisputed by the defendant. Not a single item of the testimony of any of them had any applicability whatsoever to his *identity as a participator in this crime.* So, indeed, the trial judge ruled. In that state of the case the question is whether we can sustain the further ruling that such independent testimony was none the less to be used by the jury in constructing for the accomplice-witness Reles a general credibility that would perhaps amount to a sanction for his narration of the vital and controverted particulars of his story against the defendant. * * * We think it unnecessary to probe this idea that a strong implication of the non-credibility of a witness may be rebutted by independent evidence which confirms in his confession of the very criminality which gives rise to that implication. *Whatever its merits, such a process, we believe, is not fit for the trial of issues on which life and liberty depend.*" *People* v. *Nitzberg*, 287 N.Y. 183, 38 N.E.2d 490, 40 N.E.2d 40, 138 A.L.R. 1253, 1257-1258, emphasis supplied.

It is not necessary to our point that we should urge that a requirement of corroborating the defendant's participation be erected into a Fourteenth Amendment constitutional right, for that may well not be "of the very essence of a scheme of ordered liberty," as these matters have been phrased since *Palko* v. *Connecticut*, 302 U.S. 318, 325. But a procedure subject to such denunciation as that just quoted from the New York court, if tolerable under appropriate precautions against misapplication, becomes intolerable when the trial proceeds without the restraint of defense counsel's professional training to distinguish the specious and damn the prejudicial as did the New York court. The unlearned and tongue-tied young Cash can hardly be regarded as fit to argue to a jury the lack of probative force of such corroboration, when that very question of its probative force is a subject of dispute even among learned scholars of the law.

B—Testimony Concerning Petitioner's Participation in Other Crime

The newspaper account of the trial, excerpted into the sworn petition, reports:

> "Yesterday, Lawrence Allen, a friend of Cash's for over four years, took the stand for an hour and a half and related how he and Cash in company of two others, burglarized *stores*, stole a *truck*, and became engaged in a running *gun battle* with police" (R. 12, emphasis supplied).

The crime charged against petitioner was breaking and entering to commit *a* single felony (R. 2), *a* single larceny (R. 12), viz., from the Linzmayer store (R. 14).[9] But

[9] We may follow respondent off the record by referring to the "Information for Breaking and Entering" supplied by respondent

Allen's testimony convicted Cash not only of this sole crime charged but of a general criminal career, for the emphasized words in the record passage just quoted relate to at least one other burglary, as well as the separate crimes of car theft and resisting arrest.

Florida has the standard rule that testimony of other crimes is inadmissible, subject to well-settled exceptions as to use to identify the defendant, to show plan or purpose, or to impeach. The many cases are conveniently collected in 13 *Fla. Jur., Evidence,* §§143-151. By the time of petitioner's 1955 trial it had become settled in Florida, however, that those exceptions obtain only where there is some evidence other than that of an accomplice, to identify the defendant as a participant in the principal crime charged. Just a few years before petitioner was tried, the Supreme Court of Florida, in *Padgett* v. *State,* 53 So. 2d 106 (1951), had reversed a burglary conviction where the accomplice alone had given testimony of the defendant's participation in two other burglaries and a car theft. The Florida court reasoned:

> "In all cases where testimony of other crimes has been admitted there has been at least *some evidence to connect the defendant with the crime in question,* and evidence of other crimes was admitted for the purpose

---

as an exhibit attached to his typewritten brief already filed in this Court in opposition to the petition for certiorari. The information charges "that Ray Cash and Lawrence Allen of the County of Alachua and State of Florida, on the 4th day of April, in the year of our Lord one thousand nine hundred and fifty four in the County of Alachua and State of Florida, did then and there break and enter a certain building there situate, to-wit: a store building the property of one George J. Linzmayer, Jr. with intent to commit a felony to-wit: the crime of larceny, of the property, goods and chattels of another, of the value of more than Fifty ($50.00) dollars, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Florida."

of identifying the defendant; or of proving the plan, intent, or knowledge of the defendant; or to show that the acts charged against him were not the result of accident, mistake, or inadvertence. See *Nickels* v. *State,* 90 Fla. 659, 106 So. 479, 488; *Wallace* v. *State,* 41 Fla. 547, 26 So. 713; *Bronson* v. *State,* 117 Fla. 828, 158 So. 435; *Wilson* v. *State,* 134 Fla. 199, 183 So. 748; and *Talley* v. *State,* 160 Fla. 593, 36 So. 2d 201.

"*In the instant case there is not an iota of testimony except Walden's* [the accomplice witness] *to connect the defendant with the crime for which he is charged.*

"The trial judge apparently admitted the testimony regarding these other crimes on the theory that they showed a general plan, which is one of the recognized exceptions to the rule forbidding admission of such testimony. There are literally thousands of cases in this country discussing the admission of such evidence. See the elaborate notes in 62 L.R.A. New Series 193; 26 L.R.A. New Series 466; 43 L.R.A. New Series 667; 46 L.R.A. New Series 866; 48 L.R.A. New Series 236; L.R.A. 1915A, 138 and 809; L.R.A. 1915B, 103; L.R.A. 1917D, 388; 3 A.L.R. 1540; 22 A.L.R. 1016; 27 A.L.R. 358; 63 A.L.R. 603; and 105 A.L.R. 1288. We find none which admitted such evidence when there was such an utter failure to connect the defendant with the charged crime." 53 So. 2d, at 107-108, emphasis supplied.

Thus it may be stated with certainty that Florida law forbids other-crime testimony in cases where the accomplice's identification of the defendant is not corroborated, notwithstanding Florida does not ordinarily require any corroboration at all. Hence permitting the accomplice Allen to testify about other burglaries, the auto theft, and the

gun battle with police (R. 12), was prejudicial error even under Florida law, under the allegation of the petition that "there was nothing that would connect Allen and the petitioner except Allen's word" (R. 4).

C—Guilt by Association: Testimony Concerning Crime Committed by Petitioner's Brothers But Not by Petitioner

Still more prejudicial than the foregoing testimony of petitioner's participation in other crimes was testimony of other crimes in which petitioner did *not* participate. The same informer-witness Allen was permitted to testify that he, together with petitioner's two older brothers, Virgil and Fred Cash, committed a $180,000 robbery in New Orleans, although petitioner was not there at all (R. 11).

This testimony was patently irrelevant as proof of the specific Florida burglary for which petitioner was on trial, but it had the effect of convicting petitioner through the imputation of guilt by association. The sting of this testimony lies in the fact, albeit clumsily alleged in the petition, that it was common knowledge that petitioner's brothers Virgil and Fred were part of the notorious criminal group known as "the Cash gang." The petition, in its pathetic jumble of assertion, hint and argument, puts it as follows:[10]

> "[W]hy did the Hon. Ted Duncan fail to file charges against John Fulford and Fred Cash, in this case when Lawrence Allen, the big time gangster named them as being with him when he robbed the store.
>
> "Every one who knows anything about what was known as the 'Cash' gang, knows that Ray Cash, was not a

[10] Typically, this passage occurs in the middle of a discussion of an entirely different subject, the suggestion of collusion between prosecutor, accomplice witness, and former defense attorney. (R. 10-12).

> member of that gang and that his older brother Virgil and Fred Cash would never let their baby brother hang around with them much less take part in their criminal activities. This gang was known as big time operators as the testimony of one of its old members, Lawrence Allen shows he and the other members pulled a $180,000 robbery in New Orleans, and the petitioner, Ray Cash, was not there" (R. 10-11).

The petition elsewhere states more directly that Allen had testified that petitioner's brother Fred was one of the participants in the burglary for which petitioner was on trial (R. 17-18). This identification of petitioner's brother may have been admissible as part of the direct circumstances of the crime charged. But the additional testimony that this brother, together with the informer and petitioner's other notorious brother Virgil, committed the New Orleans robbery, could have no purpose or effect other than to make petitioner out to be a member of the Cash gang. Once that membership was so established, petitioner was exposed to all the grudgingly suffered perils of a prosecution for conspiracy, *VonMoltke* v. *Gillies,* 332 U.S. 708, concurring opinion of Mr. Justice Frankfurter, at 727-728; *Krulewich* v. *United States,* 336 U.S. 440, concurring opinion of Mr. Justice Jackson, at 445, *et seq.,* while purportedly on trial for a single substantive offense. Yet conspiracy in Florida was as late as petitioner's 1955 trial a one-year county jail misdemeanor, F.S. §833.01, *Shuler* v. *State,* 57 So. 2d 336 (Fla. 1952), not the twenty-year felony, F.S. §810.01, for which petitioner was convicted and is now serving fifteen years in the state penitentiary.[11]

---

[11] Even under the more recent statute, L. 1957 c. 57-383 §2 (FS §833.04), the maximum penalty for conspiracy to burglarize would have been five years.

Florida law knows that testimony of crime committed by members of the defendant's family is a particularly dangerous violation of the *res inter alios acta* rule, even when the crime is brought home much closer to the offense charged than it was here. *Duke* v. *State,* 106 Fla. 205, 142 So. 886 (1932), defendant's father's interference with prosecution witness. More than that, when the trial court permits the introduction of such evidence of the offenses of other people, the procedure

> "ignores the traditional American doctrine requiring personal guilt rather than guilt by association or imputation before a penalty or punishment is inflicted." *Bridges* v. *Wixon,* 326 U.S. 135, concurring opinion of Mr. Justice Murphy, at 163.

In the inclusion of this evidence both of other crime with which it was claimed petitioner was connected and of other crime on which that claim was not even made, the proceedings described in the newspaper account thus matched the nightmare trial in *Gibbs* v. *Burke,* 337 U.S. 773. There, it will be recalled, violations of the state law of evidence in introducing hearsay, and in requiring the defendant to make a hostile witness his own so that he could not be impeached, and in failing to exclude the jury while instructing the defendant on his privilege not to take the stand, were held to show that the defendant was "handicapped by lack of counsel to such an extent that his constitutional right to a fair trial was denied," 337 U.S. at 781.[12] Perhaps the trial

---

[12] We do not press petitioner's complaint of the disparity of the fifteen-year sentence which he received although a first offender, and the suspended ten-year sentence whereby the ex-convict accomplice was rewarded (R. 17). But since the fifteen-year sentence seems remarkably severe for a first offender it suggests that the trial court was compounding on sentence one of the errors we have attributed to the trial, viz., letting petitioner be punished for the crimes of the Cash gang. It would have been the proper

this section, such counsel shall file a written report as to the duties performed by him and apply for discharge by the court.

"The compensation of counsel for the defendant, at the trial, shall not exceed five hundred dollars; and defendant's counsel's compensation on appeal, shall not exceed five hundred dollars additional."

§924.17 (2 Florida Statutes 1957, p. 2972)
Costs when appellant is insolvent.—

"In case the appellant shall be utterly unable to pay the costs of the cause, whether it be capital or not, either in whole or in part, and shall himself make oath before the court or the clerk thereof, and shall also by credible testimony establish satisfactorily to the court that he has no property or other means of payment either in his possession or under his control and has not divested himself of his property for the purpose of receiving benefit from this oath, and is also utterly unable to enter into the bond required to secure the payment of the judgment, fine and costs, the appeal shall be a supersedeas without such payment if the defendant remain in custody, or, in cases not capital, upon his entering into bond with two or more sufficient sureties, conditioned that he shall be personally forthcoming to answer and abide the final order, sentence, or judgment that may be passed in the premises by the appellate court, and also conditioned for his appearance before the court in which the cause was originally determined; provided, however, that if the appellant is in official custody in a state or federal prison or county or municipal jail or other penal institution or place of confinement, it shall not be necessary for him to make such oath before the court or to its clerk, and, in lieu thereof, he may present to the court his affidavit to the matters hereinabove required to be established, made before a notary public or other officer authorized to administer oaths, and, thereupon, the court shall

opportunities discussed above under "Accomplice Testimony and Its Corroboration" might have required an advocate of some little wit and learning to seize, but we submit that any man of the law would at least have objected to introducing the testimony of other crime committed by petitioner and of still other crime committed by his gangster brothers without him. The most incompetent courthouse lounger or the newest cub at the bar, had the trial court seen fit to assign the case to counsel, would thus either have had the evidence excluded or have had such errors easily reversed on appeal.[13] But be the emphasis laid on the gross trial errors or on the subtle trial problems, the result is the same. The actual trial of this accomplice case required professional technique "obviously beyond the capacity of even an intelligent and educated layman, and which clearly demands the counsel of experience and skill," *Rice* v. *Olson*, 324 U.S. 786, 789.

We do not contend that petitioner's bare allegation that he was incapable of defense would have been sufficient. But here that allegation is supported by detailed evidentiary allegations as to his age, his lack of courtroom experience, the seriousness of the charge (evidenced by the twenty year sentence permissible under the statute), and the difficulty of the case (evidenced by the complex of trial problems that we have reviewed). Those allegations at least demand answer, we submit, although they are pleaded so badly that they can be seen only through a blur of irrele-

---

function of defense counsel to see to it here too that the trial judge was at least explicitly reminded of the unfairness of sentencing for the crimes of others. Cf. *Townsend* v. *Burke*, 334 U.S. 736, 741.

[13] Florida's refusal to allow counsel in a noncapital case, FS §810.01, which generated this case, *Wade*, *House*, and many others, relates to counsel only. Even in a noncapital case, the pauper's oath in Florida covers all appeal costs including reporter's transcript, FS §§924.17, 924.23.

either enter an order of insolvency or shall require further evidence in behalf of the appellant and/or the state and then grant or deny an order of insolvency according to whether he deems the insolvency of the appellant to be satisfactorily established or not."

§924.23 (2 Florida Statutes 1957, p. 2972)
Transcribing and filing notes of stenographic reporter upon appeal by defendant.—

"When notice of appeal is filed by the defendant the trial court shall direct the stenographic reporter to transcribe his notes of the proceedings. The reporter shall certify to the correctness of the notes and the transcript thereof, and shall file the notes and the transcript with the clerk. If the prosecuting attorney or counsel for the defendant questions the correctness of the notes or transcript the question shall be settled by the court. The defendant shall pay the costs of such stenographic report, unless he is insolvent, when the costs shall be paid by the county."

vancies. That same incapacity in advocacy which is the very gravamen of the petition likewise excuses petitioner from any requirement of lawyer-like statement even as to that incapacity.

How he would demonstrate that incapacity, if permitted to prove it by trial of a denial of it on return to a writ issued, is matter of detail beyond the present occasion. Investigation of such school record as he may have had, of scores in school or selective service intelligence tests taken under circumstances not suggesting malingering, observation by psychiatrists, performance under psychologists' projective tests, all suggest themselves. The trial record itself, which should be introduced into the habeas corpus hearing as an exhibit, would be almost conclusive if it confirmed the petition's showing that petitioner and the trial judge between them botched the conduct of his defense.[14]

D—Retrial After Hung Jury

Indeed we urge that this case need not turn on the weighing of such variables but lends itself to a simple rule of thumb arising out of the fact that a hung jury was the best that former paid counsel, an experienced criminal trial lawyer (R. 11), had been able to obtain. The rule of thumb would be that any defendant who has had a hung jury on one trial needs counsel on retrial. This Court must judicially know that hung juries are so rare, and sudden withdrawals of counsel thereafter so much rarer, that such a rule of thumb will not materially burden the administration of justice. Imposing the requirement of counsel in such cases need not rest merely on the technician's recognition

[14] Undersigned counsel is informed by letter from the court reporter that the trial notes have been preserved and transcript is available on payment of standard fees.

that a layman will inevitably be baffled—as what young lawyer was not?—by the nice rules for laying the foundation for impeachment by prior inconsistent testimony, *Wigmore, Evidence,* §§1029, 1032,[15] if indeed a layman will know that such impeachment is even authorized. We assert that since presumably reasonable jurors have differed on guilt when the defendant has been represented by counsel, the desperate need for counsel on retrial is patent as a matter of elementary fairness and therefore of due process. With the case so delicately poised that the presence of counsel has in the past served only to keep it in balance, no society that claims to treasure the right to counsel can view retrial conviction in counsel's absence with anything other than shame.

II

Quite Apart From the Circumstances of the Trial, the Denial of Petitioner's Alternative Motion for Continuance to Engage Counsel Deprived Him of His Specific Constitutional Right to Paid Counsel of His Own Choice.

Petitioner's application for assignment of counsel, discussed in the preceding Point of this brief, was in the form of an alternative motion, whose other head was an application for continuance to engage new private counsel to replace withdrawn private counsel (R. 2, 3). As detailed in the Statement, petitioner learned of the withdrawal only a week or less before the date set for retrial, and did not even know when retrial was to take place until the day

---

[15] *Wigmore,* at the points cited in the text, points out that the rules vary from state to state. A person ignorant of the law of all states on these matters could hardly be expected to stumble on to the very procedure which would meet the law of any one state. In Florida, although impeachment by prior trial testimony is controlled by statute requiring a prescribed form of foundation question, FS §90.10, there are exceptions not apparent on the face of the statute. *Alford* v. *State,* 47 Fla. 1, 36 So. 436, 438 (1904).

before it happened, but his mother was during that time trying to hire substitute counsel. The petition recites that the trial judge was made aware of her attempt at the time of the motion, but it does not recite whether the trial judge then knew the fact that she had been turned down by "a number" of lawyers, that "none would accept the case for the amount of money she was able to offer them," and "they all refused because of the fee and also on the grounds that there was too little time to prepare a defense" (ib.). The trial judge denied the continuance, the petition alleges, "on the grounds the State had gone to great expense to bring witnesses to testify and therefore petitioner would have to stand trial that day" (R. 3).

In *Chandler* v. *Fretag,* 348 U.S. 3, holding habeas corpus available to correct failure of a state trial court to grant a continuance to get paid counsel in a trial on short notice, this Court explicitly referred to and applied Mr. Justice Cardozo's conception, in *Palko* v. *Connecticut,* 302 U.S. 319, 325 at n. 2, that the right of a defendant to counsel in a criminal case is one of those few in the Bill of Rights which the Fourteenth Amendment makes as binding on the states as on the federal government. The Court, resting the case on *Palko* and distinguishing *Betts* v. *Brady,* 316 U.S. 455, said:

> "Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified," 348 U.S., at 9.

Doubtless the right would be subject to limitation in proper cases, for there is notorious danger of abuse in continuance. See *Acree* v. *State,* 153 Fla. 561, 15 So. 2d 264 (1943). But here the sole ground of refusal of continuance reported in the petition was expense to the state. The petition does

not set out the expense, but it is difficult to conceive of any figure for subsistence even of a hotel full of witnesses that would be too high a price to require a civilized legal system to pay for fair trial.[16] Although the family's means were limited, the period of four days to a week in which petitioner's mother had been vainly seeking a lawyer to take the case at the fee she could offer was hardly enough to justify the assumption that no one could be found to handle the case at that fee, within some reasonable extension of time.

Moreover, the report that the lawyers consulted also turned the case down for the further reason of want of time to prepare indicates that they felt they faced a firm deadline announced in advance, such that a plea for continuance would have been unavailing. While, as stated above, it does not appear from the petition whether their reaction was brought to the trial judge's attention, we submit that it was his affirmative responsibility to inquire into the circumstances and to mould his orders to the facts by correcting such a misunderstanding, if misunderstanding it was. Failing a showing of discharge of that responsibility, his insistence on pushing petitioner to trial constituted, in the analysis that has become standard since *Powell* v. *Alabama*, 287 U.S. 45, 69, quoted at length in *Chandler* v. *Fretag*, 348 U.S. 3, 10, an arbitrary refusal to hear a party by counsel. As the Court put it in *Hawk* v. *Olson*, 326 U.S. 271, another case granting habeas corpus relief to a defendant who had been crowded to jury trial and found guilty after his request for continuance to engage counsel had been denied:

---

[16] We should concede that the then statutory rate of $2 per witness per day, FS §§932.33; 90.14 (now $3 per day, L. 1955 c. 29927, §1) is not a fair measure of the expense, for the Florida courts invariably, in our experience, allow necessary additional subsistence to holdover witnesses, by entry of special order.

"The defendant needs counsel and counsel needs time * * *. As to the issue on the motion for continuance, our duty requires us to determine only whether or not the denial under the facts alleged violates due process. We think there was an allegation that no effective assistance of counsel was furnished in the critical time between the plea of not guilty and the calling of the jury. Continuance may or may not have been useful to the accused, but the importance of the assistance of counsel in a serious criminal charge after arraignment is too large to permit speculation on its effect. We hold that denial of opportunity to consult with counsel *on any material step* after indictment or similar charge and arraignment violates the Fourteenth Amendment." 326 U.S., at 268, emphasis supplied.

By way of anticipation, we note that respondent's typewritten brief opposing the petition for certiorari, p. 8, suggests that the well-settled Florida rule, that continuance is discretionary, supplies an adequate if unrecited nonfederal ground for the order below. Since the contention may turn up in respondent's brief on the merits, we now point out that the Court, in *Williams* v. *Georgia,* 349 U.S. 375, 382, 389, has specifically rejected this thought that a federal constitutional right must bow before state court discretion conceived as an adequate nonfederal ground of decision. If the state court has the *power,* under state law, to grant a discretionary motion and thereby to vindicate a federal constitutional right, its discretionary declination to exercise that power does not constitute the adequate state ground which divests this Court's jurisdiction:

"Since his motion was based upon a constitutional objection, and one the validity of which has in principle been sustained here, the discretionary decision to deny the

motion does not deprive this Court of jurisdiction to find that the substantive issue is properly before us," *Williams* v. *Georgia,* 349 U.S. 375, at 389.

In any event, since the motion was double-barrelled, asking only in the alternative for continuance, the existence of some adequate state ground for denying the motion as to continuance could supply no warrant for denying it as to assignment of counsel on denial of the continuance.

III

The Incorporation of a Newspaper Account of the Trial Into the Sworn Petition for Habeas Corpus Constitutes an Adequate Allegation of the Trial Events Recited in the Account.

We discuss this point by way of anticipation, for respondent's typewritten brief already filed here in opposition to the petition for certiorari, pp. 12-13, asserts that petitioner may not rely on newspaper accounts of the trial, in that they were merely "personal observations by an observer of the proceedings, phrased in such a manner so as to attract the eye of the reading public." We assume that the same contention will be made in respondent's brief on the merits.

The nub of the petition, as we have excerpted it in our Statement, consists in some essentials of quotations from a local newspaper account of the trial (R. 2-3, 12, 14, 14-15, 17-18). It seems obvious that the petitioner thereby sought to borrow for his allegations the credibility of existing public print, in preference to statements of his own that a court might be tempted to treat as hallucinations. To be sure, since no testimony has yet been taken, the case comes before this Court for disposition on the face of the petition,

i.e., taking all allegations as true, *House* v. *Mayo*, 324 U.S. 42, 45; *Williams* v. *Kaiser*, 323 U.S. 41; *Hawk* v. *Olson*, 326 U.S. 271, 273, even were they to "tax credulity," *Waley* v. *Johnston*, 316 U.S. 101, 104; see also *Pennsylvania* v. *Claudy*, 350 U.S. 116, 123. But the basic prudence of petitioner's tactic is apparent, although it was unsuccessful below. All things equal, courts plagued with tall tales from the penitentiary in habeas corpus petitions may be expected to treat such a pleading with more respect if it shows that it is not only the pleader who believes the tale.

This way of writing a legal document does make for hard reading. Instead of a specific and direct allegation of petitioner's inability to engage counsel on account of limited funds and lack of preparation time, the petition covers the subject roundabout and indeed hearsay by the newspaper quotation:

> "Mrs. Cash [petitioner's mother], a graying heavy set woman, told the Sun [the newspaper] today that she was unable to get an Attorney because none would accept the case for the amount of money she was able to offer them. She said she spoke to a number of lawyers but they all refused because of the fee and also on the grounds that there was too little time to prepare a defense" (R. 2-3).

Likewise we treat the newspaper report of petitioner's clumsy trial technique, e.g.—

> "While making objections and inquiring of the Judge and witnesses, Cash appeared unsure of himself. On several occasions he would start a sentence, then stop to rephrase it or start on another subject. Before making objections Cash raised his hand to attract the attention of the Judge, then in a halting manner would make his statement" (R. 14-15).

as the full equivalent of direct allegation of a baffled and miserable attempt to cope with a forensic situation that was manifestly beyond petitioner's abilities.[17] This is because, first, these quotations were incorporated into a petition which was itself sworn (R. 20); and, second, because since that petition was filed pro se (R. 1) it is to be accorded a patient and helpful construction, in order to see whether what the petition adumbrates is worth further inquiry into the facts, however oblique the language of the petition. *Holiday* v. *Johnson*, 313 U.S. 342; *Cochran* v. *Kansas*, 316 U.S. 255; *Pyle* v. *Kansas*, 317 U.S. 213; *Rice* v. *Olson*, 324 U.S. 786; *Tomkins* v. *Missouri*, 323 U.S. 485; *Williams* v. *Kaiser*, 323 U.S. 471; *Gibbs* v. *Burke*, 337 U.S. 773.

Moreover, because this is a Florida case, there is special reason for construing the habeas corpus petition in a manner which will give petitioner full opportunity to prove under it, once and for all, any facts that are within his knowledge concerning the occurrences at or in connection with his lawyerless trial. For Florida has its own treacherous maze of statutory and decisional rules against repetitious habeas corpus, as this Court has learned: five members of the then Court felt those rules precluded relief in *Durley* v. *Mayo*, 351 U.S. 277, while the other four members felt it a miscarriage of justice that relief should be so precluded. The Florida doctrine this Court there considered binding on it as to successive habeas corpus cases is:

---

[17] For another glimpse of this youngster at bay, see the newspaper account of his bewildered instinctive reaction to the harmful but admissible evidence that a revolver taken from the Linzmayer store turned up in the accomplice witness' car (R. 3, 14): "Cash objected to introduction of the weapon and the box in which it was kept, but was unable to state a valid ground for the objection". The standard elementary text on advocacy warns that such groundless objections do the objector more harm than good. *Goldstein, Trial Technique* (1935), 354.

> "The rule is clear that a convicted prisoner should not be heard to raise in a subsequent proceeding, whatever its nature, issues that were previously raised and determined, or that the prisoner had *a fair opportunity to [raise and have determined] in earlier proceedings.*" *Washington* v. *Mayo*, 77 So. 2d 620, 621 (Fla. 1955), quoted in *Durley*, 351 U.S., at 285, emphasis supplied.

In a case which came down after argument but before opinion in *Durley*, and was not there cited by this Court, the Supreme Court of Florida restated in even stronger language its rule that a prisoner is foreclosed from raising on a second habeas corpus any point that he might have raised on a first. That was *State* v. *Mayo*, 87 So. 2d 501 (Fla. 1956), where there had been a previous direct appeal from conviction and also a state court habeas corpus and a federal court habeas corpus. The Supreme Court of Florida, reviewing the three previous proceedings, denied the writ with the comment:

> "In none of the proceedings has the question now raised been presented. Since the point now presented *has not been previously raised, despite ample opportunity to do so*, under well settled rules of decisions, we are driven to the conclusion that he has waived or forfeited the right to raise it." 87 So. 2d 501, at 503, emphasis supplied.

Although in the *Johnston* case one of the three prior proceedings involved was a direct appeal, there is no warrant for belief that the broad doctrine of that case applies only to cases involving prior direct appeals. *Durley* was itself a case which involved no direct appeal but merely successive habeas corpus proceedings. Nor does it seem to be accidental that the *Washington* v. *Mayo* language

of "raise and have determined," turned into "raise" alone in *State* v. *Mayo*. This is because the Florida rule against repetitious habeas corpus is not restricted to cases like *Durley* where the prior petition was tried out on the merits. The rule applies equally to a prior habeas corpus denied on the petition itself, as here, *Moat* v. *Mayo*, 82 So. 2d 591 (Fla. 1955).[18] We therefore submit that this Court should not, out of excess of deference to the niceties of pleading, foreclose petitioner from opportunity to dig out the trial record and whatever testimony he can find, to show that what his clumsy and secondhand newspaper quotations imprecisely say happened, did happen. Otherwise this Court, under the Florida doctrine against repetitious habeas corpus, may some day find itself in this case, as it did in *Durley*, without power to redress clear allegations of miscarriage of justice.

Conclusion

For the reasons here stated, the order of the Supreme Court of Florida denying the writ of habeas corpus should be reversed.

Respectfully submitted,

IRWIN L. LANGBEIN
Counsel for Petitioner

November 25, 1958

[18] By contrast, the controversial H.R. 8361, 85th Cong., seeking to approach this difficult problem of repetitious habeas corpus by limiting the lower federal court habeas corpus jurisdiction, preserves this distinction carefully. Sen. Rep. No. 2228, 85th Cong., 2d Sess., p. 33; H.R. Rep. No. 1293, 85th Cong., 2d Sess., p. 32; New York Times, August 16, 1958, p. 4.

APPENDIX

United States Constitution, Amendment XIV

§1 ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Florida Statutes cited

§90.10 (1 Florida Statutes 1957, p. 331)
Impeachment of witness by adverse party.—

"If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the cause and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to witness, and he must be asked whether or not he made such statements."

§90.14 [L 1955, c. 29927, §1] (1 Florida Statutes 1957, p. 331)
Witnesses; pay.—

"Witnesses in all cases, civil and criminal, in the circuit courts, county courts, county judge's courts, criminal courts of record now or hereafter created, and witnesses summoned before any referee, arbitrator or master in chancery, shall receive for each day's actual attendance three[19] dollars, and also five cents per mile for actual distance traveled to and from the courts; in courts of justices of the peace, one dollar per day and the same mileage as in the circuit court."

---

[19] Two dollars, in the form in effect at the time of the trial, 1 Florida Statutes 1953, p. 331.

§810.01 (2 Florida Statutes 1957, p. 2821)
Burglary; breaking and entering dwelling house, etc.—

"Whoever breaks and enters a dwelling house, or any building or structure within the curtilage of a dwelling house though not forming a part thereof, with intent to commit a felony, or after having entered with such intent breaks such dwelling house or other building or structure aforesaid, if he be armed with a dangerous weapon, or have with him any nitro-glycerine, dynamite, gunpowder or other high explosive at the time of breaking and entering, or if he arm himself with a dangerous weapon, or take into his possession any such high explosive within such building, or if he make an assault upon any person lawfully therein, shall be punished by imprisonment in the state prison for life, or for such term of years as may be determined by the court.

"If the offender be not armed, nor arm himself with a dangerous weapon as aforesaid, nor have with him nor take into his possession any high explosive as aforesaid, nor make an assault upon any person lawfully in said building, he shall be punished by imprisonment in the state prison not exceeding twenty years."

§833.01 (2 Florida Statutes 1957, p. 2860)
Conspiracy.—

"If two or more persons shall agree, conspire, combine or confederate: (1) To commit any offense; (2) falsely or maliciously to indict another for any offense, or procure another to be charged or arrested for any offense; (3) falsely or maliciously to prove or maintain any suit; (4) to cheat and defraud any person of any money or property by means which are in themselves criminal; (5) to cheat and defraud any person of any money or property by any means which, if executed, would amount to a cheat or to obtaining property by false pretenses; (6) to commit

any act injurious to the public health or public morals, or for the prevention or obstruction of justice; (7) to interfere with or prevent the holding or conducting of any election, or making returns thereof, or to prevent the due administration of the laws, they shall be punished by imprisonment not exceeding one year, or by fine not exceeding five hundred dollars."

§833.04 [L 1957 c. 57-383, §2] (2 Florida Statutes 1957, p. 2860)

Conspiracy to commit other felony.—

"If two or more persons shall agree, conspire, combine or confederate to commit any other felony they shall be guilty of a felony and punishable by imprisonment in the state prison for not more than one-fourth of the penalty or term which could have been imposed if the felony conspired to be committed had actually been committed, or by imprisonment in the state prison for one year, whichever may be the greater."

§909.21 (2 Florida Statutes 1957, p. 2938)

Appointment of counsel in capital cases.—

"In all capital cases where the defendant is insolvent, the judge shall appoint such counsel for the defendant as he shall deem necessary, and shall allow such compensation as he may deem reasonable, such sum to be paid by the county in which the crime was committed. Counsel, so appointed, may in the event of conviction and sentence of death, appeal the case to the supreme court, and prosecute said appeal to its final conclusion with diligence; and until the supreme court has disposed of the appeal, no compensation shall be allowed to such counsel. If counsel first appointed is unable for any reason to perfect and prosecute the appeal, the court may relieve him from such duty, but shall appoint other counsel for such purpose. When counsel so appointed by the court, in capital cases, completes the duties imposed by